

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| STATE OF OKLAHOMA, |) | |
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| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 05-cv-329-GKF(PJC) |
| |) | |
| TYSON FOODS, INC., et al., |) | |
| |) | |
| Defendants. |) | |

**STATE OF OKLAHOMA'S REPLY TO DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO SERVE REBUTTAL EXPERT REPORTS**

Plaintiff, the State of Oklahoma, ("the State") respectfully replies to Defendants' Opposition to Plaintiffs' Motion for Leave to Serve Rebuttal Expert Reports [DKT. No. 1824] ("Opposition").

I. Background

The State is entitled to present expert rebuttal evidence on certain aspects of Defendants' expert case. The Court has the discretion to determine if this expert rebuttal is presented *after* Defendants' case, or during the State's case in chief. The question posed in this motion is whether the State should be allowed to submit certain expert rebuttal reports in advance of trial.

As a result of reviewing the numerous and voluminous expert reports disclosed by Defendants in December 2008, the State's motion seeks leave to file three rebuttal expert reports on discrete topics. By their very nature, the reports would be limited to expert opinion not previously disclosed that is necessary to *rebut* new issues raised in three of Defendants' experts in their reports and presentation of such reports would benefit Defendants by giving them notice of this rebuttal expert evidence, which otherwise would come in without prior disclosure.

“Rebuttal evidence is that which explains, disproves, repels, contradicts, controverts, refutes, modifies, antagonizes, confutes or counteracts *evidence introduced by the opposing or adverse party.*” 88 C. J. S. § 195 *Trial* (emphasis added); *see also United States v. Kelley*, 187 Fed. Appx. 876, 888 (10th Cir. 2006) (“Rebuttal evidence may be introduced to explain, repel, contradict, or disprove an adversary’s proof”); *Tanberg v. Sholtis*, 401 F.3d 1151, 1166 (10th Cir. 2005) (“Rebuttal evidence is evidence which attempts to ‘disprove or contradict’ the evidence to which it is contrasted”).

Defendants’ arguments against the State’s request are entirely without merit. Defendants argue that the State should have been clairvoyant and accurately predicted the substance and basis of every opinion offered by Defendants’ experts, and that by failing to determine that particular rebuttal expert opinions were necessary *before* Defendants’ experts’ reports were even disclosed, the State has somehow been dilatory in requesting leave to file rebuttal expert reports. Obviously, it was impossible for the State to determine whether rebuttal expert reports would be appropriate until it reviewed Defendants’ expert reports, as the nature of a rebuttal report is that it responds to a statement in the other party’s report.

Defendants dedicate much of their Opposition to complaining about and rehashing previous expert deadlines set by the Court. This Court previously provided generous extensions for Defendants to disclose their expert reports, and currently the State is attempting to cooperatively address problems with Defendants’ disclosure of expert materials and failure to produce data. *See e.g.* Ex. 1, Ex. 2. Nevertheless, at this time, the parties are now well into expert discovery and the case is moving on track towards the September 2009 trial date. The State’s request for leave to file three rebuttal expert reports on discrete issues raised by

Defendants' experts in their reports produced to date will not create any of the delay or prejudice that Defendants claim.

II. The State Attempted to Meet and Confer

In an attempt to meet and confer with Defendants, counsel for the State called counsel for the Tyson Defendants, Robert George, early in the afternoon of Wednesday, December 31, 2008 (which was not a legal holiday, but regular work day in most offices). Mr. George did not answer the phone, and counsel for the State left a voice message for Mr. George. In addition, counsel for the State sent Mr. George an email message, stating "I need to talk to you as soon as possible about two matters" Ex. 3. Rather than returning the call, Mr. George sent an email explaining that he and other defense counsel were "away for the holidays" and it "may be next week" before the State could expect a response. *See id.*

Unsure of when defense counsel would return from their holiday and weighing the fact that it was extremely unlikely that Defendants would agree to the State filing rebuttal reports (which turned out to be correct), counsel for the State determined that the most prudent action was to proceed with filing the motion as soon as possible to advise the Court of this issue. Defendants argue in their Opposition that "[h]ad Plaintiffs indicated any urgency to their request" Mr. George would have put some effort into reaching his co-counsel and responding to counsel for the State. Opp., p. 5. This argument ignores the plain facts: the State made it abundantly clear to Mr. George that this was a time sensitive issue by calling, and then emailing and stating in the email "I need to talk to you as soon as possible." Ex. 3. The only response the State received was that Mr. George would be unable to respond until the following week. Thus, the State made sincere efforts to meet and confer, and did indeed communicate the urgency of the issue, but Mr. George did not provide a response due to his and his co-counsels' holiday

plans. Of course, if Defendants were willing to agree to rebuttal reports, they simply could have communicated this to the State, which would gladly withdraw its motion. However, as their Opposition makes clear, they are entirely unwilling to do so.

III. The State Is Not Seeking Changes to the Scheduling Order

Contrary to Defendants' characterization of the State's motion, the State is not seeking to amend the scheduling order. The State is simply seeking leave from the Court to file three limited rebuttal expert reports that will respond to specific issues raised in three of Defendants' expert reports. The leave the State is requesting would not alter or change any of the deadlines in the current scheduling order, but would simply result in Defendants having certain opinions of its experts that rebut the Defendants' experts' opinions contained in expert reports produced to date, *a disclosure which would ultimately benefit the Defendants by enabling them to understand what to expect at trial.* A party clearly has a right to introduce rebuttal evidence at trial. *See* 88 C. J. S. § 195 *Trial*. While the State may have expert rebuttal testimony besides that proposed in these reports, it is to Defendants' advantage to have notice about some rebuttal presently known to the State.¹

The scheduling order does not speak to rebuttal reports, either providing for them or excluding them. *See* DKT # 1685. Contrary to the representations made by Defendants (Opp., p. 1), the State has *not* previously requested leave to file rebuttal reports, as the only mention of rebuttal reports during the October 8, 2008 hearing before Judge Joyner was a brief comment from defense counsel. *See* Ex. 4, Tr. p. 36. The State could not make its request for leave until it

¹ Defendants are required to disclose additional expert reports in late January 2009 and May 2009. Depending on the content of these new reports, the State may have additional expert rebuttal and may seek leave to file one or more rebuttal expert reports, and the State reserves all rights to do so. Moreover, nothing in this reply is intended to otherwise circumscribe the State's right to offer other rebuttal evidence, including rebuttal expert opinion, at trial as necessary to rebut evidence presented by Defendants.

reviewed Defendants' expert reports. Undoubtedly, if the State had moved for leave to file rebuttal reports *prior* to reviewing Defendants' experts' reports, Defendants would have opposed that request on the grounds that the State could not identify the particular topics on which additional rebuttal expert opinion was necessary. Thus, the timing of the State's request is entirely appropriate.

If the Court does not believe that disclosure of these rebuttal expert opinions prior to trial is necessary or helpful, and that these opinions of the State's experts in rebuttal to Defendants' experts should simply be addressed in direct examination of the State's witnesses *without* prior disclosure, then the State does not need leave to submit rebuttal expert reports. However, the State assumed (perhaps by mistake) -- particularly because the rebuttal issues are expert issues -- that the Court and Defendants would prefer to have a disclosure of these rebuttal expert opinions before trial, rather than learning about these expert opinions for the first time at trial. While the State cannot anticipate *all* of the expert rebuttal testimony it may need to offer, out of a sense of collegiality and fair play it wants to give Defendants notice of *some* of the rebuttal it anticipates.

Defendants' arguments regarding "good cause" assume the State is seeking an amendment to the scheduling order, which it is not. Thus, the "good cause" standard for amending a scheduling order is not appropriate here. These expert rebuttal reports are not, contrary to Defendants' characterization, an effort to get "another bite at the apple," *see* Opposition, p. 8, as the rebuttal reports will not rehash the original expert opinions offered by the State.

For example, Defense expert Dr. Myoda "perform[ed] *additional* tests on the new bacteria that Dr. Harwood claimed to have identified." *See* Opposition, p. 8 (emphasis added). Dr. Myoda's additional testing includes samples from Canadian geese in Washington State,

beaches outside of the state, and hide samples from slaughterhouses. Clearly, the State has the right to introduce evidence at trial about why Dr. Myoda's conclusions based on this additional testing should not be credited, and to introduce this evidence through the rebuttal expert opinion. The question pertinent to the present motion is whether the Defendants want, or are entitled to, a preview of this expert rebuttal in the form of an expert report.

Defense expert Dr. Jarman purportedly “quantified and demonstrated what Plaintiffs’ [sic] experts dismissed.” *See* Opposition, p. 9. Dr. Jarman’s opinions focus on the contribution of wastewater treatment systems and the human population to the injuries in the IRW. Obviously, the State has a right to introduce rebuttal expert opinion at trial about why Dr. Jarman’s methodologies and conclusions are flawed. Defendants’ argument that the State should have been able to predict what Dr. Jarman would say in his report, and ensured that the State’s experts addressed all of those topics (no matter how off the mark they might be) months before receiving this report from Defendants, is nonsensical and is belied by their own insistence that their experts could do no work until they had the reports of the State’s experts to react to.

With regard to Defense expert Dr. Clay, Defendants claim that the State should have already known what he was going to say because of his testimony regarding bacteria at the preliminary injunction hearing. However, until the State reviewed his actual expert report in December there was simply no way the State could know what opinions he would be attempting to offer in trial. Some of Defendants’ experts used at the preliminary injunction hearing are apparently not going to be used in the trial, others altered their opinions, or added to them for various reasons including the fact that a significant aspect of the State’s claims at trial, those based on the phosphorus injuries to the IRW, were not at issue in the preliminary injunction hearing. For Defendants to expect the State to have speculated about what opinions their experts

would offer nine months later, on a variety of topics that were not at issue in the preliminary injunction hearing,² is simply unrealistic. Thus, regardless of the fact that Defendants called Dr. Clay at the preliminary injunction hearing, the State still has a right to introduce expert rebuttal opinion evidence to rebut Dr. Clay's opinions at trial.³

IV. The Defendants Will Suffer No Prejudice Due to the State's Expert Reports

Defendants' arguments regarding prejudice are without merit. In addition to several irrelevant complaints about issues not material to the pending motion, Defendants complain about the costs they will incur if they have to depose the authors of the three rebuttal reports. In light of the fact the State is by its Motion currently only seeking to file three of them, the cost of such depositions will be minimal. Furthermore, Defendants certainly have a choice regarding depositions and may find that they do not need to depose these individuals at all.

Defendants also complain that each rebuttal report would delay their ability to prepare their expert case and prepare for trial. Trial is scheduled for September 2009, nine months from now, and the Defendants disclosed the majority of their expert reports in December 2008. The remainder of their reports regarding injuries to the IRW will be disclosed over the next few weeks, with only one report being due in May. Thus, although the parties are indeed busy with

² Moreover, it should not be overlooked that the State did not have the opportunity to depose Defendants' experts prior to the preliminary injunction hearing, and the State's cross-examination of Defendants' experts at the preliminary injunction was constricted by severe time limitations. These facts underscore the fact that the State could not have been reasonably expected to be aware of the full range of expert opinions an expert in the preliminary injunction proceedings might offer in the trial proceedings.

³ Defendants argue that "[b]ecause they have not identified the specific opinions, analyses, methods or data they would challenge, what rebuttal opinions they would offer, and who would offer them, Plaintiff's claims cannot be evaluated." (Opp., p. 10). This argument is an obvious attempt by Defendants to get the State to provide them with the details of the rebuttal reports while they simultaneously attempt to prevent the State from providing them through an appropriate disclosure. Apparently, Defendants both want and do not want the substance of the State's expert rebuttal evidence.

the depositions of Defendants' experts, the State will have the laboring oar for expert discovery in the coming months as it reviews Defendants' experts' materials and deposes Defendants' experts. Defendants should be wrapping up their work on their own expert case regarding injuries, with the exception of one report, by the end of the month, and their arguments as to prejudice in this regard ring hollow.

Defendants also complain that if this motion is granted, the State will file additional rebuttal reports. Whether or not this motion is granted, the State will not know whether any other rebuttal expert reports might be appropriate until it reviews the Defendants' expert materials which are due later this month. Only then will the State know whether leave will be sought for additional reports.

V. Conclusion

For the reasons stated herein and in its Motion, the arguments set forth in Defendants' Opposition are without merit, and the State's Motion for Leave to Serve Rebuttal Expert Reports should be granted.

Respectfully Submitted,

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